UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, vs. WALLINGTON GARCIA, Defendant	**CRIMINAL ACTION NO. 16-10350-RGS**

MEMORANDUM AND DECISION
ON THE UNITED STATES' MOTION FOR DETENTION
February 1, 2017

An indictment charges that Wallington Garcia ("Defendant") conspired with Juan Mateo Soto and others to attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. The government moved to detain Defendant on the grounds that the case involves an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and the case involves a serious risk that Defendant will flee. See 18 U.S.C. § 3142(f)(1)(C) and (f)(2)(A). Because of the grand jury's probable cause finding, a rebuttable presumption that Defendant is both an unacceptable flight risk and danger to the community supports the government's motion. See 18 U.S.C. § 3142(e)(3).

On January 27, 2017, the Court conducted a hearing at which Task Force Officer Christopher Jones testified, and at which the court received other evidence and heard argument on the government's motion for detention. Defendant's counsel examined the government's witness, proffered information, but presented no witnesses or exhibits. On January 31, 2017, Defendant's counsel submitted an email to the court, at the court's direction, summarizing communications between Defendant and Defendant's Essex Superior Court probation officer in connection with

Defendant's compliance with conditions of state probation Defendant is currently serving.

The Court grants the government's motion to detain Defendant on that ground that no condition or combination of conditions will reasonably assure his appearance as required and the safety of any other person and the community.

FINDINGS OF FACT[1]

DEA agents from the Tactical Diversion Squad participated in a drug-trafficking investigation that began in Summer 2014. The indictment and the hearing evidence focus largely on the government's seizure on October 27, 2016 of six kilograms of cocaine. On that date, DEA Tactical Diversion Squad agents were conducting an authorized wiretap on a cellular telephone used by Mateo Soto. Calls indicated to agents that Mateo Soto was to take delivery of a quantity of drugs. See Exhibit 3 (a DEA Report of Investigation), ¶ 1. A call between Mateo Soto and co-defendant Angel Torres Leon reflected that "six" were available to be delivered, and that Torres Leon should have them ready when Mateo Soto came to him. Id. ¶ 3. In response, agents established surveillance at a number of locations in Lawrence. One such location was the Makarena Restaurant at 150 Common Street, a location associated with Mateo Soto. At 2:08 p.m. agents saw Mateo Soto and Defendant arrive at the Makarena in a Mercedes driven by Mateo Soto.[2] Id. ¶ 4. They exited the Mercedes and entered the restaurant. Id. At 2:26, monitors intercepted another call from Torres Leon who told Mateo Soto, "I am here already." Id. At that same time, Torres Leon was under surveillance a few blocks down Common Street. He was carrying a bag and placed it in

[1]The findings of facts are drawn from evidence presented at the detention hearing and information presented in the Pretrial Services Report.

[2]All times referred to herein are, based on the evidence, approximate and in the afternoon.

the front passenger seat of a Honda that had pulled up and parked nearby. It was driven by an unidentified woman. Id. ¶ ¶ 6-7.

At 2:33, Mateo Soto exited Makarena alone, entered the Mercedes and drove to Torres Leon, parking in front of the Honda. Id. ¶ 7. Mateo Soto hugged the female driver, who exited the Honda. Id. As he did so, Torres Leon moved the bag from the Honda to the rear seat of the Mercedes. Id. Mateo Soto spoke with the female and Torres Leon and drove away. Id. Agents initiated a moving surveillance of the Mercedes. As it turned onto a street that intersected Common near the Makarena, a Lawrence police officer, acting in cooperation with agents, pulled over the Mercedes. Id. ¶ 9. The officer asked Mateo Soto for his drivers license. Id. When Mateo Soto produced only a Dominican drivers license, the officer conducted a check and then informed Mateo Soto that he would be issued a summons and the Mercedes would have to be towed. Id. ¶¶ 9 & 11. While Mateo Soto remained at the scene, at 2:42, monitors intercepted a call from him to Torres Leon, in which Mateo Soto said that he was pulled over and he had "that" in the back. Id. ¶ 10. Torres Leon told Mateo Soto not to panic that he would call someone. Id. At 2:54, a towing service arrived to tow the Mercedes. Id. ¶ 11.

At 2:55, surveillance agents saw a Dodge Durango arrive at the Makarena. Id. ¶ 12. The unidentified driver entered the Makarena and exited two minutes later with Defendant. Id. They entered the Durango and drove away. Id. At the same time, agents saw Mateo Soto leave the scene and, after turning a corner, enter a grey van. Id. ¶ 13. The van followed the tow truck and at one point left the traffic lane and driving against oncoming traffic, pulled up beside the tow truck. Id. ¶ 21. Agents in unmarked cars who also followed the tow truck initiated their lights, and the van drove away. Id. ¶ 13. As the tow truck continued, agents saw the Durango drive slowly by the tow truck and noticed Defendant and the driver staring at the Mercedes in tow. Id.

At 3:00, agents saw a number of persons, including co-defendant Hector Gomez, to whom the Mercedes is registered, and Torres Leon, at a bodega near the location where the officer stopped Mateo Soto in the Mercedes. Id. ¶18. At 3:02, Mateo Soto called Gomez. Id. ¶13. Mateo Soto handed the phone to another co-defendant, Maximo Rodriguez, who explained to Gomez that the car was towed because Mateo Soto did not have a drivers license. Id. He told Gomez (as the registered owner) to go to the car, and "they will give it to you right away." Id. Gomez said, that he was going with Defendant "now." Id. After the call, the Durango arrived with Defendant. Id. Defendant walked to the bodega from the Durango. At 3:09, monitors intercepted two calls between Gomez and Mateo Soto. Id. ¶ 22. In the first, Gomez said that he was "going there now." Id. In the next call, he told Mateo Soto that he was with Defendant, and they were "getting there now." Id. At the tow yard, agents searched the Mercedes. From the bag in the back seat they recovered six kilograms of cocaine. Id. ¶24.

At 6:41, monitors intercepted a call from Defendant to Mateo Soto during which Defendant told Mateo Soto what Defendant had been told by an unidentified person relating, apparently, to why the car was stopped and towed. See Exhibit 4. Defendant asked if they could "speak on this phone," and when Mateo Soto replied that he could, Defendant continued to relate what he had been told. Id. Mateo Soto instructed Defendant to have a third person "take it out," that Mateo Soto was prepared to pay 30,000 to 50,000 "pesos," but to "do it urgently." Id. During this call, Defendant stated he thought at one point this third person was calling Defendant about getting a hair cut. Defendant also stated that he was about to go to the Home Depot, but would contact "him." Id.

Defense Case

Through cross examination, Defendant established that prior to October 27, 2016, agents had intercepted only some communications involving Defendant, none of which were inculpatory. There was no evidence of surveillance of Defendant prior to October 27, 2016. Officer Jones conceded that drug traffickers use others to assist in executing drug deals. Counsel established also that Defendant speaks English.

Defendant proposed release on the following conditions: reside with Defendant's mother at her home in Lawrence on home detention, GPS monitoring, a curfew, an agreement not to work at any location the government identifies as possibly related to the drug trafficking, no contact with co-defendants or witnesses. Defendant also proffered that his girlfriend was four months pregnant and that the anticipated birth of Defendant's child and a future with his girlfriend showed Defendant's ties to the area and the United States. Defendant also suggested that during the term of probation Defendant is currently serving for a drug felony conviction in Essex Superior Court, Defendant was largely compliant and demonstrated an ability and willingness to comply with conditions of release. Lastly, Defendant conceded that there is a warrant for his arrest in Essex Superior Court for violating the conditions of his probation. This violation is based on the conduct which is the subject of the instant indictment. In Defendant's view, his willingness to risk release to Essex Superior Court Probation and face the possibility of up to 21 months' incarceration for violating his state probation and, at the same time, not receive federal credit for detention, demonstrates Defendant's confidence that the Essex County Probation Department would take a favorable view of Defendant's compliance while on probation.

LAW

In order to detain a person pending trial under 18 U.S.C. §§ 3141 et seq. (the Bail Reform Act), the judicial officer must find (1) by clear and convincing evidence, that the defendant is a danger to the community, or (2) by a preponderance of the evidence, that the defendant poses a risk of flight. 18 U.S.C. § 3142 (f); see United States v. Patriarca, 948 F.2d 789, 792-93 (1st Cir. 1991); United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986), cert. denied, 479 U.S. 978 (1986). The judicial officer may then detain a person pending trial only if the judicial officer determines that "no condition or combination of conditions [set forth under 18 U.S.C. § 3142 (b) or (c)] will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e).

In making the determination as to whether "any condition or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person and of the community," the judicial officer must consider the following factors:

> (1) the nature and circumstances of the offense charged, including whether the offense...involves...a controlled substance;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including:
>
> > (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and,
> >
> > (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release . . . .

18 U.S.C. § 3142(g). The judicial officer "may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

Where, as here, a grand jury has found probable cause to believe that a defendant has committed an offense for which a maximum term of imprisonment of ten years of more is prescribed in the Controlled Substances Act, it shall be presumed that no condition or combination of conditions will reasonably assure his appearance as required and the safety of the community. See 18 U.S.C. § 3142(e)(3). This presumption imposes only a burden of production on a defendant; the burden of persuasion to establish flight risk and dangerousness remains with the government. United States v. Moss, 887 F.2d 333, 338 (1st Cir. 1989). To meet the burden, the defense must produce only "some [relevant] evidence." United States v. Jessup, 757 F.2d 378, 381 (1st Cir. 1985). The introduction of such evidence, however, does not eliminate the presumption entirely. See United States v. Dillon, 938 F.2d 1412, 1416 (1st Cir. 1991). Rather, the presumption remains in the case as one of the elements to be considered by the judicial officer. See Jessup, 757 F.2d at 383.

Pretrial Services Report

According to the Pretrial Services Report, Defendant is 30 years old. He was born in Brooklyn, New York, and has resided in Lawrence for 15 years in a duplex owned by his mother. His sister resides in the upper unit. Defendant has never been married, has no children, but is expecting his first child with a woman named Katherine, last name unknown. They were never in a relationship and they have no plans for a future together. Defendant has a U.S. Passport that was seized. He last traveled three months ago to Guatemala to visit a sick friend.

On January 29, 2016, Defendant was convicted of Possession to Distribute a Class B Substance in Essex Superior Court. He was sentenced to two and a half years in jail, with 9 months to serve. In April 2016, Defendant was released from custody. Upon release, he established "D Monster Car Wash" in Lawrence with $15,000. Defendant also works 20 hours per week cleaning the Makarena Restaurant, and earns $400 weekly doing so. He tested positive for marijuana while on release in October 2016.

One condition of probation prohibited Defendant from traveling outside Massachusetts without permission. As noted above, three months ago Defendant traveled to Guatemala. At the hearing, Defendant asserted that he believed he had permission to travel. He said that his probation officer had told Defendant, in substance, that after six months on probation, his travel would not be restricted. I directed the parties to communicate with Defendant's probation officer regarding any communications relating to Defendant's permission to travel. On January 31, 2017, counsel for Defendant submitted an email that reported the following:

"1. [Assistant Probation Officer John Carlson] does remember speaking with [Defendant] relative to going out of state for work, that he advised [Defendant] that he would have to wait for six months and then the decision would have to be approved by the Chief Probation Officer, Marty Wallace.

2. That [Carlson] could not remember any conversation relative to [Defendant] inquiring about going out of the country.

3. That the proper procedure for going out of the country by a probationer would require judge approval."

Analysis

I find that Defendant has offered sufficient evidence to rebut the statutory presumption of risk of flight and danger to the community. Defendant is a U.S. citizen. He has resided in Lawrence for 15 years. His mother and sister live in Lawrence with him, and his mother owns the duplex at which Defendant lived at the time of his arrest, and would live if released. Defendant's criminal history is limited to one prior arrest, which resulted in the above-described conviction. In 2016, Defendant invested $15,000 in, and established, a car wash business in Lawrence. These ties are sufficient to rebut the presumption.

I turn then to the 3142(g) factors the court is required to consider in determining whether there are conditions which will reasonably assure Defendant's appearance as required and the safety of any other person and the community. The first factor, the nature and circumstances of the offense charged, supports detention. The charged conspiracy involves an attempt to possess six kilograms of cocaine. As shown by the language of the statute, among the categories of offenses expressly recognized by Congress as warranting special consideration are crimes involving a controlled substance. See 18 U.S.C. § 3142(g)(1). Apart from the offense involving cocaine, a controlled substance, the quantity of the controlled substance – six kilograms – is an aggravating circumstance that supports detention. It reflects Defendant's participation in the distribution of a large quantity of drugs; such a quantity poses a greater threat to the safety of the community in which the cocaine is packaged, distributed and used. The drug quantity is also an aggravating circumstance in terms of the flight risk calculation. Such a quantity potentially increases Defendant's jail exposure, and thereby increases the risk that Defendant would flee to avoid the consequences of a conviction. See U.S.S.G. § 2D1.1 (drug quantity table).

The weight of the evidence weighs neither against nor for detention. In the court's view, the evidence goes beyond the suggestion of Defendant's counsel that Defendant was a mere dupe. Defendant has been recently convicted of a narcotics distribution felony. On October 27, 2016, Defendant was at the Makarena, which was Mateo's Soto's likely destination before he was stopped and the Mercedes with the cocaine was intercepted. Shortly after the stop, Defendant went to the scene or vicinity of the car stop in the Durango and studied the Mercedes in tow. His presence at such location shows that he received some communication about the cocaine seizure. This colors the significance of Defendant's other conduct: Defendant traveled with the car's registered owner to the tow yard. Whether there as a translator or as support, Defendant went to the location to which the Mercedes was taken to gather information and support efforts to recover the cocaine. Finally, the evidence shows that Defendant agreed to follow Mateo Soto's directive to contact someone and convey the "urgent" message that Mateo Soto would pay tens of thousands of "pesos" if the cocaine were recovered from the Mercedes. This strikes the court as going beyond being innocently duped into helping a criminal cause.

On the other hand, certainly some evidence can be explained. Defendant's presence at Makarena initially, for instance, could be explained by the fact that he cleans there 20 hours per week. As ably argued by Defendant's counsel, Defendant's intercepted call with Mateo Soto showed that Defendant was reporting what someone told him, and not what Defendant necessarily knew himself. In the call there were also suggestions of Defendant's lack of engagement in the efforts to recover the cocaine. For instance, at one point Defendant told Mateo Soto that Defendant thought a call he was receiving from a third person had to do with getting a hair cut (and presumably not the cocaine seizure). In response to Mateo Soto's request that Defendant contact a third person to have them recover the cocaine, Defendant cursed the interruption in his plan to go to the Home Depot. In sum, evidence is not lacking, but its weight is not so strong that it might cause a released defendant to believe that a conviction was inevitable, and flee to avoid the consequences.

Defendant's history and characteristics support detention. Indeed, I find matters considered here to be particularly persuasive in determining that no conditions will reasonably assure Defendant's appearance as required and the safety of any other person and the community. Foremost is Defendant's criminal history and conduct while on supervision. As noted above, On January 29, 2016, Defendant was convicted in Essex Superior Court of Possession to Distribute Class B and given a 2 and one half years suspended sentence, with 9 months to serve. Defendant was also sentenced to probation for two years. See Exhibits 1 and 2. This was a first conviction. While the government has offered no evidence about the nature and circumstances of this conviction, it appears to have been serious enough that it was indicted and that, even with no criminal history, Defendant received 9 months' incarceration.

The government's evidence in the instant case would suggest that the conviction and sentence failed to provide any specific deterrence, and that within months of his release from custody on April 20, 2016, Defendant was associating with individuals involved in trafficking a significant amount of cocaine. In this regard, Defendant's argument that an investigation that began in summer 2014 uncovered no evidence of Defendant's participation in drug trafficking until October 2016 to be unpersuasive. First, the Essex Superior Court indictment plainly indicates otherwise; clearly, Defendant was involved in some level of drug dealing in that case which was sufficiently serious to warrant indictment and a term of incarceration. Second, Defendant's detention in connection with that case explains, at least to some extent, why agents would not have seen Defendant on surveillance or intercepted him on wiretaps, at a minimum, before April 2016.

Defendant's performance while on probation also supports detention and is particularly concerning. While on release, Defendant was prohibited from committing new crimes, leaving the Commonwealth without permission, and using a controlled substance. See Exhibit 2 (listing conditions of probation). In the short time between Defendant's April 20, 2016 release to probation and his December arrest, Defendant violated each of these conditions. The instant indictment and the evidence presented shows commission of a new crime. Defendant traveled to Guatemala without permission.[3] In October, Defendant tested positive for marijuana. His attorney argued that Defendant was candid about his marijuana use, admitting at an October 26, 2016 VOP hearing that Defendant used marijuana. While such an admission may show a Defendant's willingness to re-commit to complying with probation, the evidence shows that the following day Defendant was involved in helping Mateo Soto recover six kilograms of cocaine, thereby violating a separate condition of probation, and undermining the notion of Defendant's commitment to the terms of his court-ordered state supervision.

Next, Defendant argued at the hearing that Defendant was five months from becoming a father and participating in a future with his child and the child's mother. This argument is squarely at odds with the Defendant's own statements in PTS report. It states: "The defendant advised that he has never been married and is currently single. He is expecting his first child with a woman

[3]Defendant's counsel argued at the hearing that Defendant understood from his probation officer that Defendant had permission to travel after six months. However, as shown by counsel's January 31, 2017 email reproduced herein, Defendant's probation officer does not recall ever discussing with Defendant travel outside the United States.

named Katherine (LNU). The two, who had two brief encounters, were never in a relationship, and have no plans at this time for the future." When the court raised this information at the hearing, Defendant explained, in substance, that he deliberately misrepresented his relationship and future family plans in order to protect his girlfriend. This argument seems implausible. Disclosing the full identity of the mother of Defendant's child and plans for a future together does not seem, without more, like information that would entangle his girlfriend in Defendant's drug trafficking or in other illegal conduct. To the contrary, it seems like information that would support Defendant's release. In any case, if Defendant is now telling the truth, it shows that Defendant was not truthful with PTS when he was interviewed. This raises a host of concerns about Defendant's candor, and other information in the PTS report which remains unverified.

Lastly, although Defendant has family and a business in Lawrence, neither of these were sufficient to deter Defendant from participating in the instant conspiracy. Even if the kilograms of cocaine belonged to Mateo Soto and, if recovered, would have been packaged and distributed by him, the evidence presented shows, at a minimum, that Defendant supported Mateo Soto's efforts to recover that cocaine and distribute it in Lawrence. In supporting this effort, Defendant put the community at risk from the harms that the distribution and use of such a quantity of cocaine visits upon families and communities. I find this factor to be persuasive evidence that Defendant's family and commercial ties to Lawrence are secondary to his drug associations.

I am also required to consider whether at the time of the offense and arrest, Defendant was on probation. As noted, Defendant was. Defendant has demonstrated by his conduct that he is unwilling or unable to comply with conditions placed about his liberty.

Lastly, I am required to consider the nature and seriousness of the danger to any person or the community Defendant's release would pose. Defendant's participation in the attempt to recover six kilograms of cocaine for Mateo Soto easily places him in a certain category of dangerousness. As alluded to above, such conduct endangers individuals in the community where the drugs are sold: innocent third parties who may live, work or attend school near the location drugs are sold; drug users; and the families of drug users. Defendant's role in this offense shows that his concern for the safety of community in which his family lives and his business operates is secondary to his commitment to a drug organization. While I recognize that some part of the drug organization with which Defendant was associated has been dismantled by the arrests of four co-conspirators, it is also clear that others remain at liberty, including the woman who brought the cocaine to Torres-Leon, and those who sent her. However, given that Defendant participated in this instant offense while on probation, the court take little comfort that the conditions of pretrial supervision Defendant has proposed are sufficient to ensure Defendant will not resume a role in distributing dangerous drugs.

This is a somewhat close case, given the weight of the evidence and Defendant's ties to Lawrence. However, I find that the evidence establishes by a preponderance, that no condition or combination of conditions will reasonably assure Defendant's appearance as required, and by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person or the community. Accordingly, I grant the government's motion.

IT IS ORDERED:

1. That Defendant be committed to the custody of the Attorney General, or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

2. That Defendant be afforded a reasonable opportunity for private consultation with

counsel; and

3. On order of a Court of the United States or on request by an attorney for the Government, the person in charge of the corrections facility in which Defendant is detained and confined shall deliver him to an authorized Deputy United States Marshal for the purpose of any appearance in connection with a court proceeding.

VI. RIGHT OF APPEAL

THE PERSON OR PERSONS DETAINED BY THIS ORDER MAY FILE A MOTION FOR REVOCATION OF AMENDMENT OF THE ORDER PURSUANT TO 18 U.S.C. § 3145(b).

/s/ David H. Hennessy
David H. Hennessy
UNITED STATES MAGISTRATE JUDGE